S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the Application of INDIANA MICHIGAN POWER COMPANY for a certificate of necessity pursuant to MCL 460.6s and related accounting authorizations.	))))))	Case No. U-17026

NOTICE OF PROPOSAL FOR DECISION

The attached Proposal for Decision is being issued and served on all parties of record in the above matter on December 17, 2012.

Exceptions, if any, must be filed with the Michigan Public Service Commission, 4300 West Saginaw, Lansing, Michigan 48917, and served on all other parties of record on or before December 27, 2012, or within such further period as may be authorized for filing exceptions. If exceptions are filed, replies thereto may be filed on or before January 4, 2012. **The Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.**

At the expiration of the period for filing exceptions, an Order of the Commission will be issued in conformity with the attached Proposal for Decision and will become effective unless exceptions are filed seasonably or unless the Proposal for Decision is reviewed by action of the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Thomas E. Maier

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Thomas E. Maier
Administrative Law Judge

December 17, 2012
Lansing, Michigan

S T A T E O F M I C H I G A N

MICHIGAN ADMINISTRATIVE HEARING SYSTEM

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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PROPOSAL FOR DECISION

I.

HISTORY OF PROCEEDINGS

This case involves an Application filed by Indiana Michigan Power Company (I&M) on May 1, 2012, requesting that the Michigan Public Service Commission (Commission) grant a certificate of necessity (CON) pursuant to MCL 460.6s (Section 6s) and requesting related accounting authorizations. Section 6s was enacted as part of 2008 PA 286, and this is the first case before the Commission pursuant to Section 6s. I&M proposes to invest approximately $1.169 billion in its D.C. Cook nuclear power plant.[1] This investment is the estimated cost of the project labeled by I&M as the Cook Life Cycle Management (LCM) Project. I&M claims that it will make this significant investment with the single purpose of assuring that the Cook Units 1 and 2 are able to safely, reliably,

[1] A portion of this cost is allocable to I&M's retail customers in Michigan.

and efficiently provide capacity and energy through their extended operating licenses, 2034 and 2037, respectively.[2]

In its May 1, 2012 filing, I&M included with its Application supporting testimony and exhibits, as well as a Motion for a Protective Order. A hearing on that motion and a prehearing conference were held on June 5, 2012, before Administrative Law Judge (ALJ) Thomas E. Maier.

I&M was represented by attorney Richard J. Aaron. The Commission Staff (Staff) was represented by Assistant Attorney General Spencer A. Sattler.[3] Intervenor status was granted to Attorney General Bill Schuette (the Attorney General), represented by Assistant Attorneys General Donald E. Erickson and John A. Janiszewski; Permissive Intervenor status was granted to the Michigan Environmental Council (MEC), represented by attorney James P. Clift.[4] 1 TR 5-7.

Proofs of publication and mailing of the notice of hearing were accepted without objection. 1 TR 5.

After oral argument on I&M's Motion for a Protective Order, the Motion was granted and a Protective Order was entered. 1 TR 28-29. A consensus schedule was set by the parties. 1 TR 29-31.

A Petition to Intervene Out of Time was filed by New Covert Generating Company, LLC. A hearing was held on that Petition, which was opposed by I&M and Staff, and the Petition was denied. 2 TR 63-68.

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[2] In 2005, I&M received license extension for the operation of the Cook units. 3 TR 88.
[3] Amit T. Singh also entered an appearance on behalf of Staff and participated in the case.
[4] Christopher M. Bzdok also entered an appearance on behalf of MEC and participated in the case.

On July 12, 2012, the parties filed a Stipulation to Permit the Late Intervention of the Association of Businesses Advocating Tariff Equity (ABATE), and the Administrative Law Judge issued a Ruling granting ABATE intervenor status. ABATE was represented by Robert A.W. Strong.

ABATE, the Attorney General, the Commission's Staff, and MEC filed testimony and exhibits on August 7, 2012, and I&M filed rebuttal testimony and exhibits on September 5, 2012.

On September 17-19, 2012, cross-examination of the parties' witnesses was conducted. I&M presented six witnesses: Paul Chodak, III; Michael H. Carlson; Steven M. Fetter; John F. Torpey; Scott M. Krawec; and Paul G, Schoepf.[5] Staff presented five witnesses: Kevin Krause; Lisa M. Kindschy; Eric W. Stocking; Steven E. Kulesia; and Shannon W. Whiton. The Attorney General presented one witness, John Hosmer. ABATE presented one witness, James T. Selecky. MEC presented one witness, John G. Athas.

On October 12, 2012, initial briefs were filed by I&M, Staff, the Attorney General,[6] MEC, and ABATE. On October 26, 2012, reply briefs were filed by the same parties. The evidentiary record consists of five volumes of public transcript, consisting of 814 pages of testimony, and 61 exhibits admitted into evidence. Some of the testimony and exhibits are designated as confidential

[5] Mr. Schoepf replaced Terry Brown as a witness, adopting the Revised prefiled Direct Testimony of Terry Brown and sponsoring his own prefiled Direct and Rebuttal Testimony.

[6] The Attorney General filed both Confidential and Public versions of his Initial Brief. The ALJ believes that the issues can be addressed in this case without disclosing confidential information. All references to the Attorney General's Initial Brief cite to pages in the Confidential version.

under the Protective Order and are in a confidential file and/or in a confidential portion of the transcripts.

II.

STATUTORY AND REGULATORY FRAMEWORK AND REQUIREMENTS

Section 6s sets the framework for this case and I&M's requests. It requires the Commission to grant a CON if the Commission makes certain findings. It provides, in pertinent part:

> (1) An electric utility that proposes to construct an electric generation facility, make a significant investment in an existing electric generation facility, purchase an existing electric generation facility, or enter into a power purchase agreement for the purchase of electric capacity for a period of 6 years or longer may submit an application to the commission seeking a certificate of necessity for that construction, investment, or purchase if that construction, investment, or purchase costs $500,000,000.00 or more and a portion of the costs would be allocable to retail customers in this state. A significant investment in an electric generation facility includes a group of investments reasonably planned to be made over a multiple year period not to exceed 6 years for a singular purpose such as increasing the capacity of an existing electric generation plant. The commission shall not issue a certificate of necessity under this section for any environmental upgrades to existing electric generation facilities or for a renewable energy system.
>
> * * *
>
> (3) An electric utility submitting an application under this section may request 1 or more of the following:
>
> (a) A certificate of necessity that the power to be supplied as a result of the proposed construction, investment, or purchase is needed.

(b) A certificate of necessity that the size, fuel type, and other design characteristics of the existing or proposed electric generation facility or the terms of the power purchase agreement represent the most reasonable and prudent means of meeting that power need.

* * *

(d) A certificate of necessity that the estimated purchase or capital costs of and the financing plan for the existing or proposed electric generation facility, including, but not limited to, the costs of siting and licensing a new facility and the estimated cost of power from the new or proposed electric generation facility, will be recoverable in rates from the electric utility's customers subject to subsection (4)(c).

(4) Within 270 days of the filing of an application under this section, the commission shall issue an order granting or denying the requested certificate of necessity. The commission shall hold a hearing on the application. The hearing shall be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287. The commission shall allow intervention by interested persons. Reasonable discovery shall be permitted before and during the hearing in order to assist parties and interested persons in obtaining evidence concerning the application, including, but not limited to, the reasonableness and prudence of the construction, investment, or purchase for which the certificate of necessity has been requested. The commission shall grant the request if it determines all of the following:

(a) That the electric utility has demonstrated a need for the power that would be supplied by the existing or proposed electric generation facility or pursuant to the proposed power purchase agreement through its approved integrated resource plan that complies with subsection (11).

(b) The information supplied indicates that the existing or proposed electric generation facility will comply with all applicable state and federal environmental standards, laws, and rules.

(c) The estimated cost of power from the existing or proposed electric generation facility or the price of power specified in the proposed power purchase agreement is reasonable. The commission shall find that the cost is reasonable if, in the construction or investment in a new or existing facility, to the extent it is commercially practicable, the estimated costs are the result of competitively bid engineering, procurement, and construction contracts, or in a power purchase agreement, the cost is the result of a competitive solicitation. Up to 150 days after an electric utility makes its initial filing, it may file to update its cost estimates if they have materially changed. No other aspect of the initial filing may be modified unless the application is withdrawn and refiled. A utility's filing updating its cost estimates does not extend the period for the commission to issue an order granting or denying a certificate of necessity. An affiliate of an electric utility that serves customers in this state and at least 1 other state may participate in the competitive bidding to provide engineering, procurement, and construction services to that electric utility for a project covered by this section.

(d) The existing or proposed electric generation facility or proposed power purchase agreement represents the most reasonable and prudent means of meeting the power need relative to other resource options for meeting power demand, including energy efficiency programs and electric transmission efficiencies.

(e) To the extent practicable, the construction or investment in a new or existing facility in this state is completed using a workforce composed of residents of this state as determined by the commission. This subdivision does not apply to a facility that is located in a county that lies on the border with another state.

(5) The commission may consider any other costs or information related to the costs associated with the power that would be supplied by the existing or proposed electric generation facility or pursuant to the proposed purchase agreement or alternatives to the proposal raised by intervening parties.

(6) In a certificate of necessity under this section, the commission shall specify the costs approved for the construction of or significant investment in the electric generation facility, the price approved for the purchase of the existing electric generation facility, or the price approved for the purchase of power pursuant to the terms of the power purchase agreement.

(7) The utility shall annually file, or more frequent if required by the commission, reports to the commission regarding the status of any project for which a certificate of necessity has been granted under subsection (4), including an update concerning the cost and schedule of that project.

(8) If the commission denies any of the relief requested by an electric utility, the electric utility may withdraw its application or proceed with the proposed construction, purchase, investment, or power purchase agreement without a certificate and the assurances granted under this section.

(9) Once the electric generation facility or power purchase agreement is considered used and useful or as otherwise provided in subsection (12), the commission shall include in an electric utility's retail rates all reasonable and prudent costs for an electric generation facility or power purchase agreement for which a certificate of necessity has been granted. The commission shall not disallow recovery of costs an electric utility incurs in constructing, investing in, or purchasing an electric generation facility or in purchasing power pursuant to a power purchase agreement for which a certificate of necessity has been granted, if the costs do not exceed the costs approved by the commission in the certificate. Once the electric generation facility or power purchase agreement is considered used and useful or as otherwise provided in subsection (12), the commission shall include in the electric utility's retail rates costs actually incurred by the electric utility that exceed the costs approved by the commission only if the commission finds that the additional costs are reasonable and prudent. If the actual costs incurred by the electric utility exceed the costs approved by the commission, the electric utility has the burden of proving by a preponderance of the evidence that the costs are reasonable and prudent. The portion of the cost of a plant, facility, or power purchase agreement which exceeds 110% of the cost approved by the commission is presumed to have been incurred due to a lack of prudence. The commission may include any or all of the portion of the cost in excess of 110% of the cost approved by the commission if the commission finds by a preponderance of the evidence that the costs were prudently incurred.

* * *

(11) The commission shall establish standards for an integrated resource plan that shall be filed by an electric utility requesting a certificate of necessity under this section. An integrated resource plan shall include all of the following:

(a) A long-term forecast of the electric utility's load growth under various reasonable scenarios.

(b) The type of generation technology proposed for the generation facility and the proposed capacity of the generation facility, including projected fuel and regulatory costs under various reasonable scenarios.

(c) Projected energy and capacity purchased or produced by the electric utility pursuant to any renewable portfolio standard.

(d) Projected energy efficiency program savings under any energy efficiency program requirements and the projected costs for that program.

(e) Projected load management and demand response savings for the electric utility and the projected costs for those programs.

(f) An analysis of the availability and costs of other electric resources that could defer, displace, or partially displace the proposed generation facility or purchased power agreement, including additional renewable energy, energy efficiency programs, load management, and demand response, beyond those amounts contained in subdivisions (c) to (e).

(g) Electric transmission options for the electric utility.

(12) The commission shall allow financing interest cost recovery in an electric utility's base rates on construction work in progress for capital improvements approved under this section prior to the assets being considered used and useful. Regardless of whether or not the commission authorizes base rate treatment for construction work in progress financing interest expense, an electric utility shall be allowed to recognize, accrue, and defer the allowance for funds used during construction related to equity capital.

> (13) As used in this section, "renewable energy system" means that term as defined in the clean, renewable, and efficient energy act. MCL 460.6s.

This is the first case before the Commission under Section 6s and, therefore, the Commission's first opportunity to interpret the statute. Moreover, as Staff has noted: "If the Commission grants I&M a CON in this case and preapproves costs for I&M's LCM project, its decision will meaningfully affect future ratemaking proceedings because MCL 460.6s(9) guarantees I&M recovery of these preapproved costs through retail rates." Staff's Initial Brief, p 4.

The parties have argued for different interpretations of Section 6s as it relates to this case. This PFD will address the statutory requirements individually and discuss these arguments within the context of each requirement.

Finally, as the Attorney General has pointed out, in utility cases, a utility bears the burden of going forward with evidence as well as the burden of persuasion. *In re Michigan Gas Utilities Co,*MPSC Case No. U-7484, Opinion & Order dated 8-30-83, p 10, and *In re Detroit Edison,* MPSC Case No. U-8020-R, Opinion and Order dated 7-9-87), pp 16-17. Thus, I&M must prove all required facts by a preponderance of the evidence. *BCBSM v Governor,* 422 Mich 1, 88-89; 367 NW 2d 1(1985).

III.

THE LCM PROJECT

I&M proposes to invest approximately $1.169 billion in its D.C. Cook nuclear power plant. This investment is the estimated cost of the LCM project. I&M Witness Michael Carlson defined the LCM as:

> the integration of aging management and economic planning to optimize the operation, maintenance, and service life of Systems, Structures, and Components (SSCs); maintain an acceptable level of performance and safety; and maximize return of investment over the service life of the plant. 3 TR 295.

I&M's LCM project consists of 117 sub-projects that will be performed through 2018. Mr. Carlson testified that the sub-projects' sole purpose is to allow the Cook plant to run safely and reliably during the extended license period.[7] 3 TR 295. Many of the sub-projects will be completed during regular refueling outages that are scheduled approximately 18 months apart for each unit. 3 TR 297. Some of them can even be performed while the units are online. 3 TR 306. These sub-projects are shown in Confidential Exhibit I&M-17.

An engineering, procurement, and construction contractor evaluated the Cook plant's systems and components in 2010 as part of a study to determine the feasibility and potential costs of a LCM project and power uprate. 3 TR 298–299. I&M decided against a power uprate, but it continued to pursue the LCM project by identifying a complete list of sub-projects necessary for lifecycle management. 3 TR 299, 305. The process that I&M used to identify

[7] In 2005, I&M received license extensions for the operation of Cook Units 1 and 2 through 2034 and 2037, respectively. 3 TR 88.

and screen the sub-projects is displayed as a flow diagram in Exhibit I&M-16; the sub-projects themselves are listed on Confidential Exhibit I&M-17.

I&M witness Paul Chodak also testified that the LCM project is necessary in order to continue to operate the Cook plant. 3 TR 94. Mr. Chodak detailed other benefits of the LCM project which included continued long term employment and construction jobs, an increase in approximately 50 MW of generation from more efficient components, better customer service and value, environmental stewardship, operational performance, community relations, and employee satisfaction. 3 TR 93.

In addition, although I&M is not planning a power uprate as part of this LCM Project, it has preserved the option for the future by sizing some LCM components for uprated capacity. 3 TR 304; 4 TR 419. Mr. Carlson explained that I&M proposes to upsize equipment in order to allow it to meet rising demand in the future at a low cost:

> The LCM project represents a "once in a plant lifetime" replacement opportunity for certain plant equipment. If this equipment is not slightly upsized to allow for the option to uprate later, but instead is replaced in-kind, then the future opportunity to uprate the unit will be much more costly. In some cases, this upsizing of equipment results in near-term cost increases. In other cases – where an upsized component allows us to buy a "standard size" rather than a "custom size" – upsizing can actually lower costs. 3 TR 305.

Among other equipment, I&M proposes to upsize certain heat exchangers, transformers, and pumps. 3 TR 304-305. I&M estimated that it will cost approximately $23 million to size its equipment for a potential power uprate. This cost accounts for 2% of its total LCM project cost. 4 TR 419.

IV.

DOES THE LCM PROJECT QUALIFY FOR A CON UNDER SECTION 6s(1)?

A. The Type of Investment

The Attorney General and ABATE contend that the LCM Project does not qualify under Section 6s(1) for approval of a CON. Attorney General's Initial Brief, pp 19-24; Attorney General's Reply Brief, pp 3-9; ABATE's Reply Brief, p 1-2, 4-5. They argue that the LCM project does not meet the statutory requirement for the type of investment covered by Section 6s(1). As it relates to the LCM project, Section 6s(1) provides:

> An electric utility that proposes to make a significant investment in an existing electric generation facility may submit an application to the commission seeking a certificate of necessity for that investment if that investment costs $500,000,000.00 or more and a portion of the costs would be allocable to retail customers in this state. A significant investment in an electric generation facility includes a group of investments reasonably planned to be made over a multiple year period not to exceed 6 years for a singular purpose such as increasing the capacity of an existing electric generation plant. MCL 460.6s(1).

The Attorney General contends that the LCM project activities are not a group of activities for a singular purpose such as increasing the capacity of an existing electric generation plant. Attorney General's Initial Brief, p 21. The Attorney General argues that Section 6s(1) uses the term "singular purpose" and includes the example of increasing the capacity of an existing electric generation plant. He asserts that the plain meaning of the word "singular" in this statute means a purpose that is different, distinct, exceptional, and out-of the-ordinary. Considering the whole record in this case, as MCL 24.285 requires, the Attorney

General contends that I&M's so-called LCM "project" simply adds together 117 sub-projects over a period of six years, which are numerous usual and ordinary types of capital projects in an effort to reach and exceed the $500 million statutory minimum in Section 6s, and therefore, I&M's proposal does not qualify for a certificate of necessity under Section 6s(1). *Id.*

I&M and Staff disagree with the Attorney General's interpretation of the statute. I&M asserts that the Attorney General's definition of singular fails to recognize that singular also means "of or relating to a single instance or something to be considered by itself." I&M's Reply Brief, p 4. Similarly, Staff contends that the Attorney General has construed the statute too narrowly. Staff cites Webster's Dictionary for the definition of singular:

> 1 a : of or relating to a separate person or thing : INDIVIDUAL b : of, relating to, or being a word from denoting one person, thing, or instance c : of or relating to a single instance or to something considered by itself . . . 3 : set apart or memorable as being out of the ordinary : UNUSUAL . . . . [*Webster's Ninth New Collegiate Dictionary* (1985).] Staff's Reply Brief, pp 6-7.

Staff contends that the Attorney General has used the third definition, and that he failed to consider the term's purpose in the statutory scheme. Staff's Reply Brief, p 7. Staff argues that the purpose of Section 6s(1)'s reference to a group of investments with a singular purpose was intended to expand the kinds of projects for which a CON may be granted. *Id.*

Staff argues that Section 6s(1) refers to a group of investments planned for a singular purpose "*such as* increasing the capacity of an existing electric generation plant." MCL 460.6s(1) (emphasis added). Staff's Reply Brief, p 5. Staff asserts that words and phrases like "such as" and "includes" can be used

as terms of enlargement or limitation. See *In re Townsend Conservatorship*, 293 Mich App 182, 188; 809 NW2d 424 (2011); see also *Sharp v City of Benton Harbor*, 292 Mich App 351, 355–356; 550 NW2d 739 (1996). Staff cites *In re Townsend Conservatorship*, wherein the Court of Appeals considered the common usage and understanding of the phrase and held that the phrase "for reasons such as," as used in a different statute, is a term of enlargement that introduced a series of nonexclusive examples. 293 Mich App at 188. Staff argues that the same common usage and understanding should apply in this case. Staff's Reply Brief, p 6.

Both I&M and Staff contend that the LCM's singular purpose is demonstrated by Mr. Chodak's testimony that "[a]ll LCM projects are being performed because they are necessary to extend the life of the units beyond the 40 year design life of the plant . . . ." I&M's Reply Brief, p 4; Staff's Reply Brief, p 7 (both citing 3 TR 107).

The ALJ agrees with Staff and I&M that the LCM project qualifies as "a significant investment in an electric generation facility" because it "includes a group of investments reasonably planned to be made over a multiple year period not to exceed 6 years for a singular purpose such as increasing the capacity of an existing electric generation plant." MCL 460.6s(1). The Attorney General's reading of the statute is too narrow. The ALJ believes that Section 6s(1) was intended to cover a group of significant investments necessary to extend the life of an electric generation facility to permit it to operate through a lengthy extended license period as is the case here. The record is clear that the LCM project is

necessary for the continued operation of the Cook plant during the extended licensing period and to comply with I&M's NRC licenses. 3 TR 91, 107. Therefore, the ALJ finds that the LCM project qualifies for a CON under Section 6s(1)'s definition of the types of investments for which a CON may be granted.

B. The Six Year Requirement

Section 6s(1) permits a CON to be granted for a "group of investments reasonably planned to be made over a multiple year period not to exceed 6 years . . ." MCL 460.6s(1). I&M has listed its LCM project investments as follows:

> The LCM Project cost estimate through 2018 is $1.169 billion, which includes actual costs incurred in the 2nd half of 2011. Table 1 below shows the cost estimate on an annual basis.

Table 1. Annual LCM Project Cash Flows

Period	Cost Type	Cost (millions)
2011 3Q/4Q	Actual	$20
2012	Estimate	$161
2013	Estimate	$334
2014	Estimate	$147
2015	Estimate	$219
2016	Estimate	$110
2017	Estimate	$97
2018	Estimate	$81
Total	$1,169	

3 TR 306.

Staff, the Attorney General, and ABATE assert that these costs cover a period beyond the six year period limitation in Section 6s(1). Staff's Initial Brief, pp 21-22; Attorney General's Initial Brief, p 26; ABATE's Initial Brief, p 2. As a result, Staff recommends removing the costs for the third and fourth quarters of

2011 and for all of 2012 from the LCM project costs for which a CON may be granted. Staff's Initial Brief, pp 21-22. ABATE agreed with Staff's position. ABATE's Initial Brief, p 2. The Attorney General asserts that the evidence is ambiguous regarding what total adjustment should be made. Attorney General's Initial Brief, p 27.

I&M contends that the six year window in Section 6s(1) should be interpreted to apply to the period when specific components are placed in service. I&M's Initial Brief, pp 40-41; 3 TR 222. I&M argues that it is performing the work to be done during plant outages to avoid interrupting the supply of low cost emission free power generated by the Cook plant; therefore, the work cannot be viewed as taking over 6 years to complete. I&M's Initial Brief, p 41. I&M contends that the Commission can find that the work being performed is only taking longer on a calendar year basis than the six years because of the benefits of avoiding prolonged outages for construction purposes; thus the Commission can find that the actual work being performed and the investment in the Michigan-based Cook plant is planned to be done in a timeframe less than six total years. *Id.*

Staff argues that Section 6s(1) does not refer to plant being placed in service; it refers to investments being made. Staff's Initial Brief, p 21. Section 6s(1) says that a significant investment "includes a group of investments *reasonably planned to be made* over a multiple year period not to exceed 6 years." Staff asserts that the focus is on when the investment is made not on when it is completed and placed in service. *Id.* Staff contends that when

interpreting a statute, "if the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id.* (citing *Herman v Berrien County*, 481 Mich 352, 366; 750 NW2d 570 (2008)). Staff argues that 6s(1) is not ambiguous and must be enforced as written to apply to expenses incurred rather than plant in service.

The ALJ agrees with Staff, the Attorney General, and ABATE. Section 6s(1) is clear and unambiguous that it is intended to cover investments *made* over a period not to exceed six years. Nothing in the statute suggests that the six year time limit applies to the period when items are placed in service. Moreover, I&M's argument that the Commission can find that the actual work being performed and the investment in the Michigan-based Cook plant is being done in a timeframe less than six total years because it is being done during outages would render the six year limitation virtually meaningless. Could the Commission compute the six year limitation by counting only those days where work is actually being performed? Could the Commission exclude weekends and holidays to expand the six year window? Nothing in the statute suggests any such interpretations. The statute is clear and unambiguous in limiting a CON to investments made during a period not to exceed six years. The plain language of the statute should be enforced as written.

Staff selected the final six years of the LCM project as its statutory window because those years are fully forecasted. Staff's Initial Brief, p 22. Staff asserts that it is counterintuitive to expect the Commission to *preapprove* costs that I&M will have already incurred when the Commission issues a final order. *Id.* The

ALJ agrees with Staff. The purpose of Section 6s is to permit an electric utility "that *proposes to* . . . make a significant investment" to obtain a CON that preapproves costs. MCL 460.6s(1) (emphasis added). Therefore, the ALJ recommends that costs for the third and fourth quarters of 2011 and all the 2012 calendar year be removed and that I&M's requested relief regarding these costs be denied. This exclusion amounts to $175,231,000.[8] 5 TR 774.

V.

THE COMMISSION'S STATUTORY AUTHORITY TO MODIFY I&M's APPLICATION

The Attorney General contends that the language of Section 6s(4) bars the Commission from modifying a requested certificate of necessity to reduce the amount of requested costs that it will approve or to include other changes. Attorney General's Initial Brief, pp 31-32. Section 6s(4) provides that the Commission "shall issue an order *granting or denying* the requested certificate of necessity." MCL 460.6s(4) (emphasis added). The Attorney General cites numerous cases to the effect that the Commission's powers are limited and that they may not be extended by inference. Attorney General's Initial Brief, pp 32-33. The Attorney General argues that limiting the Commission's power to either granting or denying I&M's requested CON is consistent with the fact that Section 6s(8) empowers a utility to withdraw its application *or* proceed with the

[8] This is the subtotal for this time period, excluding the management reserve, from Confidential Exhibit I&M-22. This amount includes the removal of $39,373,924 from the LCM Project cost estimate for projects that were included in the 2012 rate base in Case No. U-16180. *See,* Exhibit I&M-32.

proposed construction without a CON and the assurances under the statute. Attorney General's Initial Brief, p 32. He also argues that it is consistent with the voluntary nature of the application for a CON; that denying approval of a certificate of necessity does not infringe upon the right of management to make its own decisions; and that it does not prevent I&M from filing a new application, which may qualify for approval of a CON. *Id.* The Attorney General concludes that

> The affirmative, clear and unmistakable language in MCL 460.6s(4) empowering the Commission to grant or deny a certificate of necessity coupled with the absence of language empowering the Commission to modify a utility's proposal means modification power does not exist. *South Haven v Van Buren Bd of County Comm'rs,* 478 Mich 518, 530, n 16; 734 NW2d 533 (2007). Attorney General's Initial Brief, p 33.

The Attorney General also argues that in other statutes such as MCL 460.6j(6) and MCL 460.6h(6), the Legislature has authorized the Commission to approve, disapprove, reject or amend utility plans. Attorney General's Reply Brief, p 13. He argues that the Commission cannot assume the Legislature inadvertently omitted from MCL 460.6s language that it placed in another statute. *Id.* (citing *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). *Accord, People v Monaco,* 474 Mich 48, 58; 710 NW2d 46 (2006), *People v Anstey*, 476 Mich 436, 444; 719 NW2d 579 (2006), and *South Haven v Van Buren Bd of County Comm'rs,*478 Mich 518, 530, n 16; 734 NW2d 533 (2007)).

If the Attorney General's interpretation is adopted, the Commission would have to deny I&M's CON request if the Commission agrees with the interpretation of the six year limitation discussed above.

Staff and I&M oppose the Attorney General's suggested interpretation of the Commission's authority. I&M contends that Section 6s(4) contains no specific words granting expressed power to the Commission and is not a grant of authority. I&M's Reply Brief, p 35 (citing *Huron Portland Cement Co v Michigan Public Service Comm*, 351 Mich 255 (1958) as regards MCL 460.6). I&M argues that Section 6s(4) merely provides a timeframe for the Commission to act. I&M's Reply Brief, p 35. I&M asserts that Section 6s(4) can clearly be harmonized with the balance of the Commission's statutory authority. *Id.*

Staff contends that the Attorney General ignores other provisions in Section 6s that are relevant to the Commission's authority. Staff's Reply Brief, p 9. Staff points to Sections 6s(5) and 6s(6), argues that they would be rendered meaningless if the Attorney General's interpretation is accepted, and asserts that courts must "avoid a construction that would render any part of a statute surplusage or nugatory." *Id.*, p 10 (citing *People v Redden*, 290 Mich App 65, 76–77; 799 NW2d 184 (2010)). Staff cites *GC Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003), for the proposition that words and phrases in a statute should not be read in a vacuum, but should be interpreted in the context of the statute as a whole. *Id.*, p 9. Staff also quotes *Walters v Leech*, 279 Mich App 707, 709-710; 761 NW2d 143 (2008) (citation omitted), to the effect that: "Statutes that relate to the same subject or that share a common purpose are *in pari material* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Id.* Therefore, Staff contends that both Section 6s(5) and (6) relate to the same

subject as Section 6s(4) and should be considered when interpreting this subsection. *Id.*

Section 6s(5) allows the Commission to consider "other costs or information related to the costs associated with the power that would be supplied." Staff argues that there would be no reason to allow the Commission to consider other cost information introduced by intervening parties if the Commission is not permitted to adjust I&M's cost estimates. *Id.*, p 10. Section 6s(6) provides, "[T]he commission shall specify the costs approved for . . . significant investment in the electric generation facility." Staff asserts that there would be no need to specify the amount the Commission approves if the Commission has no choice but to approve or deny the amount being requested.

The ALJ agrees with the legal concepts put forth by Staff regarding statutory interpretation. However, he does not agree with Staff's contention that Section 6s(5) would be rendered meaningless if the Attorney General's interpretation is adopted. The Commission could consider other cost information in deciding whether to grant or deny a CON request. On the other hand, Section 6s(6) provides clear support for permitting the Commission to modify I&M's CON request.

The ALJ finds the language of Section 6s(8) also very instructive of the Legislature's intent. That section provides that "[i]f the commission denies *any of* the relief requested by an electric utility, the electric utility may withdraw its application or proceed with the proposed construction, purchase, investment, or power purchase agreement without a certificate and the assurances granted

under this section." MCL 460.6s(8) (emphasis added). The Attorney General's interpretation of the statute would make the words "any of" surplussage. If the Commission could only grant or deny a CON request, Section 6s(8) should read: "[i]f the commission *denies the relief requested* by an electric utility, the electric utility may withdraw its application or proceed with the proposed construction, purchase, investment, or power purchase agreement without a certificate and the assurances granted under this section." As Staff has pointed out, courts must avoid a construction that would render any part of a statute surplusage or nugatory. Staff's Reply Brief, p 10 (citing *People v Redden*, 290 Mich App 65, 76–77; 799 NW2d 184 (2010)). Section 6s(8) clearly contemplates that the Commission may deny *some* of the relief requested by an electric utility. Thus, it obviously envisions that the Commission has the authority to modify a CON request by denying portions of the request. For the reasons discussed above, the ALJ finds that the Commission has the authority to modify I&M's CON request by denying some of the relief requested.

VI.

THE REQUIREMENTS OF SECTION 6s(4)

Section 6s(4) provides that the Commission shall grant the CON request if it makes all of the determinations identified in subsections (a) through (e). Each will be addressed in turn.

A. Section 6s(4)(a)

Section 6s(4)(a) provides that the Commission shall determine:

> That the electric utility has demonstrated a need for the power that would be supplied by the existing or proposed electric generation facility . . . through its approved integrated resource plan that complies with subsection (11). MCL 460.6s(4)(a).

No party has suggested that I&M does not need the power that the Cook plant supplies. The Attorney General argues, however, that the relevant inquiry is whether or not the projected LCM sub-projects are needed to avoid shutting the Cook plant down between now and 2034 and 2037, when the current unit licenses expire. Attorney General's Initial Brief, p 25. He also asserts that I&M has submitted no evidence claiming to support a conclusion the licenses will be extended beyond 2034 and 2037, that extending the licenses would be feasible and economical, or that the 2013-2018 LCM sub-projects would enable I&M to obtain and use additional extended licenses. *Id.* The Attorney General also argues that I&M's evidence regarding need is speculative and unquantified. Attorney General's Reply Brief, p 18. His witness, Mr. Hosmer, contended that I&M should have provided component failure root cause evaluations, along with the component failure reports, for each major component included in the LCM project scope. 5 TR 711-12. He also asserted that I&M should have provided information comparing the DC Cook units' service life with industry standards. *Id.* The Attorney General argues that failure to provide this information made I&M's evidence speculative and generalized.[9]

Staff responds that the statute clearly requires a showing of the need for the power, not a showing that the LCM project is needed to avoid a plant shut-

[9] The Attorney General and his witness, Mr. Hosmer, also maintained that seven sub-projects they call "uprate" sub-projects should be excluded for I&M's CON proposal. These are discussed in more detail in Section VI.C.3.

down. Staff's Reply Brief, p 8. Staff noted that the Cook plant is being operated at or near maximum capacity and supplies approximately 50% of I&M's energy. Staff's Initial Brief, p 13; *see also* 3 TR 90. Staff also referenced I&M's Integrated Resource Plan and the planned retirement of three Tanner Creek units as supporting the need for the Cook plant's power both now and in the future. Staff's Initial Brief, p 14; *see also* Exhibit I&M-3, pp 50-51; 4 TR 550.

I&M contends that its witnesses were unequivocal about the LCM project being necessary to continued operation of the Cook plant during the license extensions. I&M's Reply Brief, p 10. I&M cited its Exhibit I&M-1 and Mr. Chodak's testimony as demonstrating that the LCM project costs are over and above the Cook plant's typical capital spending. *Id.* Mr. Chodak explained that these investments are reasonable and necessary because if the LCM project is not performed completely, the availability of Cook plant generation would deteriorate. 3 TR 91-92. Mr. Chodak also testified that the LCM project is necessary in order to continue to operate the Cook plant. 3 TR 94. Mr. Carlson testified that the LCM project is comprised of sub-projects which are performed for the single purpose of allowing the plant to safely and reliably operate for the additional 20-year period of the licenses. 3 TR 296. He also testified that it was determined that if these sub-projects were not performed, the Cook plant would not be able to fulfill the extended lifespan. 3 TR 298-299. Further, each sub-project was screened against the criteria set forth in Exhibit I&M-16 to ensure that the sub-project was properly classified as part of the LCM project based on the required criteria and also furthering the singular purpose of the LCM project

as necessary to maintain the safe and reliable future operation of the Cook plant. 3 TR 299. Finally, Mr. Schoepf testified that if the LCM sub-projects are not performed, the Cook plant will not be able to run at some point. 4 TR 486-487.

With regard to the Attorney General's contention that I&M should have provided root cause reports and failure basis information or undertaken a comparison of industry service lives, I&M pointed to the testimony of Mr. Schoepf that no root cause reports were performed because these studies are not undertaken until a piece of equipment fails. 4 TR 440-441. The equipment in this case has not failed. 4 TR 440. I&M also noted that the service lives of the original equipment were designed and approved for forty years, based upon industry standards. I&M also pointed out that Exhibit I&M-26 shows each component to be replaced as part of the LCM project was evaluated based on wear, degradation or obsolescence. I&M's Reply Brief, p 32; *see also* 4 TR 441. The replacement of components was not determined on the basis of run to failure. Instead, the criteria used were wear, degradation, or obsolescence based on onsite engineers monitoring components daily. I&M argues that in this light, it would not be needed or useful to compare industry service life reports. *Id.*

The ALJ agrees with Staff and I&M that I&M has shown that there is a need for the power that will be generated by the Cook plant now and in the future. The record demonstrates that the LCM project is necessary to assure that the Cook plant will be able to operate through the remaining years of its extended license, and that without the LCM project, the Cook plant will not be able to continue such operations. The Attorney General's contention that I&M's

evidence is speculative and unquantified is rejected. The testimony cited above, as well as I&M's screening process (Exhibit I&M-16), support this conclusion. Therefore, the ALJ finds that I&M has met the requirements of Section 6s(4)(a).

B. Section 6s(4)(b)

Section 6s(4)(b) requires that the Commission determine that:

> The information supplied indicates that the existing or proposed electric generation facility will comply with all applicable state and federal environmental standards, laws, and rules. MCL 460.6s(4)(b).

No party argues that I&M's proposed investments will violate applicable state and federal environmental standards, laws, and rules. Therefore, the ALJ finds that I&M has met the requirements of Section 6s(4)(b).

C. Section 6s(4)(c)

Section 6s(4)(c) requires that the Commission determine that:

> The estimated cost of power from the existing or proposed electric generation facility . . . is reasonable. The commission shall find that the cost is reasonable if, in the construction or investment in a new or existing facility, to the extent it is commercially practicable, the estimated costs are the result of competitively bid engineering, procurement, and construction contracts . . . . Up to 150 days after an electric utility makes its initial filing, it may file to update its cost estimates if they have materially changed. No other aspect of the initial filing may be modified unless the application is withdrawn and refiled. A utility's filing updating its cost estimates does not extend the period for the commission to issue an order granting or denying a certificate of necessity. An affiliate of an electric utility that serves customers in this state and at least 1 other state may participate in the competitive bidding to provide engineering, procurement, and construction services to that electric utility for a project covered by this section.

Staff, the Attorney General, and ABATE all recommend that some costs be removed because they are unreasonable.

1. Costs for the third and fourth quarters of 2011 and 2012

The removal of these costs has been discussed at length in Section IV.B., above. As discussed there, the ALJ recommends that costs for the third and fourth quarters of 2011 and all the 2012 calendar year be removed and that I&M's requested relief regarding these costs be denied. This exclusion amounts to $175,231,000.[10] 5 TR 774.

2. Management reserve

Staff, the Attorney General, and ABATE argue that the $220,000,000 management reserve be excluded. *See*, Staff's Initial Brief, pp 23-28; Attorney General's Initial Brief, pp 27-28; ABATE's Initial Brief, pp 2-3. Staff claims that the management reserve is an excessive contingency that should be eliminated. Staff's Initial Brief, p 23. Staff asserts that I&M's testimony indicates that there are three levels of contingency over and above the statutory allowance for excess costs in MCL 460.6s(9). *Id.* The first level of contingency is referred to as a risk reserve. I&M witness Paul Schoepf testified, "Risk reserve is included in the funding of each project as it progresses to address discrete potential defined issues or 'known unknowns' . . . ." 4 TR 423. He goes on to say that risk reserve is incorporated into each sub-project budget. I&M reduces the risk

[10] This is the subtotal for this time period, excluding the management reserve, from Confidential Exhibit I&M-22. This amount includes the removal of $39,373,924 from the LCM Project cost estimate for projects that were included in the 2012 rate base in Case No. U-16180. *See,* Exhibit I&M-32.

reserve allotted to each sub-project as projects progress because there are fewer risks in the latter phases of execution. 4 TR 423. Thus, Staff argues, since most of the LCM sub-projects are still in early phases, the risk reserve that I&M included is presumably larger than it will be in later phases.[11] Staff's Initial Brief, p 24.

Staff asserts that the second level of contingency in the LCM project is what I&M refers to as management reserve. The management reserve is a contingency that is designed to cover what I&M calls "unknown unknowns." 4 TR 424. I&M set aside 20% of its current LCM cost estimate as a safeguard against these unknown unknowns, totaling $220,000,000. 4 TR 424; Confidential Exhibit I&M-22; Exhibit I&M-32. Staff argues that in its direct and rebuttal testimony, I&M's witnesses clearly stated that the management reserve was distinct from the risk reserve and that it included both contingencies in its cost estimates to fulfill different functions. Staff's Initial Brief, p 24 (citing 4 TR 431). Mr. Schoepf testified that while the risk reserve is incorporated into each sub-project budget, the management reserve is allocated to account for project costs that could not realistically be estimated or budgeted. 4 TR 424. Mr. Schoepf said unequivocally that "both risk reserve and management reserve have been included in the project cost estimate because their purposes are significantly different." 4 TR 431.

Staff contends that I&M also included a third level of contingency by relying on third parties for certain cost estimates. Staff's Initial Brief, p 25. Staff argues that I&M used initial cost estimates in the DC Cook Phase 1 Report that

[11] I&M did not quantify the risk reserve it assigned to sub-projects.

Shaw Nuclear Services, Inc., a third party consultant, prepared for I&M. 5 TR 769; Exhibit S-1. Staff contends that I&M based its cost estimates for some projects on information in the Shaw Report and informed Staff that it did not make changes to individual cost items in the report:

> While not all of the LCM sub-projects are included in the "DC Cook Phase 1 Report for Cook Improvement Project," the costs presented in the report were used to determine the initial cost estimates for those LCM sub-projects included. *I&M did not make any changes to Shaw's individual cost items.* However, in addition to Shaw's individual line items, costs were added for I&M project governance and oversight of Shaw. Project governance and oversight includes, but is not limited to the following: project controls personnel (both I&M and staff augmentation), project team, project manager, construction manager and craft oversight, and material logistics. Staff's Initial Brief, p 25 (citing Staff Exhibit S-1 (emphasis added)).

Staff argues that I&M conceded that it did not adjust the Shaw estimates, and the Shaw estimates already include contingency allowances that ranged from 15% to 25%. *Id.* (citing 5 TR 769; Staff Exhibit S-2).

In addition, Staff asserts that Section 6s(9) also essentially adds a fourth layer of contingency. *Id.*, pp 25-26. That provision of the statute allows I&M to recover additional costs up to 110% of the cost approved by the Commission if I&M can demonstrate that the excess costs were reasonable and prudent.[12]

Staff concludes that the numerous contingency layers in I&M's cost estimate are unreasonable as presented. Staff states that I&M is essentially requesting a 30% contingency over and above the other contingencies that are already built into the sub-projects. *Id.*, p 26 (citing 5 TR 770). Staff recommends

[12] The statute also permits I&M to recover additional costs that are more than 110% of the approved amount, but I&M must overcome a statutory presumption that the costs are not reasonable and prudent. MCL 460.6s(9).

that the Commission eliminate superfluous layers of contingency from I&M's CON and exclude $220,000,000 for the management reserve because it is for "unknown unknowns" and has not been designated for any particular sub-project.[13] *Id.* Staff argues that the management reserve is the most speculative of the contingency costs that I&M included, stating, "one has to wonder whether any cost could be farther removed from a just and reasonable cost than an 'unknown unknown.'" *Id.*

Staff stated that the removal of the contingency identified as management reserve for preapproval is not a predetermination that additional project costs cannot be recovered. Staff witness Ms. Kindschy testified:

> Staff's removal of the management reserve costs from the level requested by I&M in this case should not be interpreted as indicating or implying that reasonably and prudently incurred costs related to the LCM project could not be subject to recovery. The Company has the opportunity to seek recovery, subject to review, of capital costs through the normal rate case process. 5 TR 770-771.

Staff believes that it is reasonable for the Commission to retain oversight throughout the LCM project, so it is not necessary to pre-approve recovery of "unknown unknowns" by including a management reserve contingency. Staff's Initial Brief, p 27. ABATE agreed with Staff's position. ABATE's Initial Brief, pp 2-3.

Similarly, the Attorney General argues that costs that are unknown-unknowns are very speculative, not concrete, and are therefore not reasonable cost projections within the scope of MCL 460.6s(6) and MCL 460.6s(4)(c).

[13] Staff's $220,000,000 adjustment is the sum of the four management reserve categories shown on page 3 of Confidential Exhibit I&M-22. 5 TR 770.

Attorney General's Initial Brief, p 27. He contends there are two reasons why the Commission should not include the $220 million management reserve. First, costs to be identified under MCL 460.6s(6) must be specific, and unknown-unknowns simply are unquantified and non-specific. *Id.* Second, in effect adding I&M's management reserves to the total to be specified in a CON would provide unjust and unreasonable double protection for I&M and could enable I&M to evade the burdens of proof that MCL 460.6s(9) assigns to a utility as a part of authorizing recovery for costs in addition to those specifically approved in a CON issued by the Commission. *Id.*, pp 27-28.

I&M argues that Staff's contention that there are three levels of contingencies is wrong. I&M's Reply Brief, p 14. I&M asserts that "management reserve is the only contingency allowed for in the total LCM Project" cost estimate.[14] *Id.* (citing 3 TR 103). I&M contends that Staff's conclusions are wrong because the "individual cost items" relate to amounts excluding contingencies. *Id.*, p 15. I&M cites Mr. Schoepf's testimony in this regard:

> So it's 32 sub-projects that were listed in the Shaw Report. The Shaw Report contained a cost and a contingency which Shaw added and then a total cost, if you will. What we did to develop the costs in I&M-22 was we removed all the contingency from the Shaw cost, so we had a raw cost, if you will, and then we added the indirect costs and those were the individual sub-project costs, then we totaled those and that was that 600 -- I don't have it in front of me -- but that was the number that I gave you, the 600 and – I believe it was 639 million out of 948 million and, again, I want to

[14] I&M argues that contrary to Staff's claim in brief that other than bare assertions I&M did not provide evidence to confirm that I&M removed contingencies form the Shaw estimates, the unchallenged sworn testimony of 2 witnesses who were subject to cross examination is sufficient evidence. In particular, Mr. Schoepf's testimony on cross examination on the cost estimating process is unchallenged and extensive. I&M's Reply Brief, p 14.

> point out that the 948 was without the management reserve which is listed separately on I&M-22 and there was no contingency dollars in those 32 projects that came over from the Shaw phase 1 report. 3 TR 535-536.

Mr. Schoepf testified further that the contingencies in the Shaw Report were removed in response to questions by the ALJ:

> JUDGE MAIER: All right. I have a couple of questions, then I will see if anyone has any follow-up. Just so I understand what you just said, there was a cost number in Exhibit 25, the Shaw Report?
>
> THE WITNESS: Yes.
>
> JUDGE MAIER: And you took out the contingency that was in there and added in indirect costs to arrive at the number that would be listed on I&M-22?
>
> THE WITNESS: That's correct. 4 TR 536.

I&M also argues that the Shaw Report only included 32 of the 117 sub-projects in the LCM project.[15] I&M's Reply Brief, p 16. That means that 85 of the sub-projects listed in Exhibit I&M-22 were not considered in the Shaw Phase 1 Report. *Id.*, p 17 (citing 4 TR 520c). I&M states that Mr. Schoepf explained that there were three basic approaches to making cost estimates for these remaining 85 sub-projects. 4 TR 467c. Using the Shaw Report as a starting point was only one. The second type of cost estimate involved a project request form (PRF), which was initiated by plant personnel and processed through the Plant Health Committee. *Id.* The PRF includes a cost estimate for a project originated by a system manager and then reviewed and approved by the Plant Health Committee and others. 4 TR 468c. This cost estimate "again, does not include

[15] Attachment 1 to I&M's Reply Brief is a list of the 32 sub-projects found in the Shaw phase 1 Report and in Exhibit I&M-22. I&M presented this information in the aggregate so as to avoid having a protected version of its Reply Brief.

any contingency." *Id.* The third cost estimate approach involves I&M's long-range plan for the site. 4 TR 468-469c. This plan is produced to identify projects needed for plant longevity. As part of the long-range site plan, cost estimates are developed, "typically through benchmarking with other utilities." 4 TR 469c. "Once again, those cost estimates are just a conceptual cost estimate with no contingencies" but are considered a valid cost estimate with a commensurate level of accuracy. *Id.* As a result, I&M argues, the fundamental premise for Staff's position on management reserve was based on a misunderstanding that there were contingencies already provided on a sub-project level. I&M's Reply Brief, pp 17-18. Therefore, I&M contends that Staff's recommendation to exclude management reserve would be at odds with the Staff position that allows for contingencies in the cost estimates. I&M's Reply Brief, p 18 (citing 5 TR 786).

I&M also argues that Staff confused risk reserve and management reserve with the cost estimating process. *Id.* I&M then discusses in detail the phased management process I&M proposes to use for the LCM Project. *Id.*, pp 18-20. Mr. Schoepf testified that a cost estimate was developed for each of the 117 sub-projects which comprise the LCM project. 4 TR 417. These individual costs estimates either came from a 3rd party vendor, were benchmarked by I&M, or were re-bid by other vendors and vetted through internal reviews to ensure the accuracy of scope and costs. He explained that cost estimate accuracy depends upon the particular phase of each sub-project. He also listed the Cook plant standard project management accuracy guidelines at the beginning of each phase:

Phase 1: +/-50%
Phase 2A: +/-25%
Phase 2B: +/-15%
Phase 3: +0/-10%
4 TR 418.

I&M states that some sub-projects will "under-run" or be less than the estimated amount, while others may go over budget. I&M's Reply Brief, pp 19-20. I&M states that it intends to "harvest" savings from under-running sub-projects to fund over-running projects or to fund risk reserves. *Id.*, p 19.

I&M also argues that providing a contingency is necessary and proper as part of the cost estimating process for major construction projects. *Id.*, pp 20-21. I&M cites the rebuttal testimony of Mr. Chodak that contingency is an industry standard and there would have been greater costs had contingencies been applied to individual sub-projects. 3 TR 104-105. I&M states that Staff did not perform an independent evaluation of I&M's management reserve, thus the only testimony is that of I&M's witness. I&M's Reply Brief, p 21. I&M contends that the management reserve is reasonably set representing 20 percent of the total estimated sub-project costs. I&M's Reply Brief, p 22. I&M argues that Staff's underlying argument actually supports the management reserve at the level proposed by I&M. *Id.* I&M asserts that Staff accepted a level of contingency that ranged from 15 to 25 percent, but the only distinction is that Staff applied the contingency it assumed was in the Shaw Report (see page 33 of Exhibit I-25). *Id.* I&M contends that it removed that contingency and instead built in a contingency at 20 percent through the management reserve.

I&M also takes issue with the position of Staff and the Attorney General that Section 6s(9) adds an additional layer of contingency to the cost of the LCM project. Section 6s(9) states:

> If the actual costs incurred by the electric utility exceed the costs approved by the commission, the electric utility has the burden of proving by a preponderance of the evidence that the costs are reasonable and prudent. The portion of the cost of a plant … which exceeds 110% of the cost approved by the commission is presumed to have been incurred due to a lack of prudence. MCL 460.6s(9).

I&M argues that the language of the statute is not an excuse to approve a project cost at a level lower than reasonably expected costs. *Id.*, p 23. I&M states that a utility would have to prove the reasonableness and prudence of costs that were greater than the approved project cost but less than 10 percent more, and that the only benefit this section extends to those greater costs is that they are not presumed to be imprudent. *Id.* I&M asserts that Staff's recommendation that the Commission approve only $773.6 million in project costs significantly understates the project costs and virtually guarantees that the LCM project will be subject to the second prudence review. *Id.* (citing 3 TR 106). I&M contends that as a matter of policy to encourage investment, it would be inappropriate to discourage significant investments in existing facilities that are providing reliable low cost power to customers by knowingly under estimating costs. *Id.* (citing 3 TR 107). I&M argues that this does not reflect the purpose of 2008 PA 286, and that ten percent does not present itself as an opportunity to approve an inaccurate initial cost. *Id.*

Staff argues that I&M's assertion that the total LCM project contingency would have been higher if it had used the industry standard for each sub-project is an unsupported statement. Staff's Initial Brief, p 28. I&M did not discuss contingency levels that are common in the industry or compare the total contingency it proposed for the LCM project with the industry standard. *Id.*

Further, I&M's allegation that Staff did not offer an independent evaluation of the amount of the management reserve, and the suggestion that removing the management reserve equates to "knowingly under estimating costs," errantly assumes that it was possible to independently evaluate the amount of the management reserve. Staff's Reply Brief, p 4. As I&M's witnesses testified, the management reserve is held for "unknown unknowns" that may occur in the course of the LCM project. *Id.* (citing 3 TR 105; 4 TR 430). Staff states that since it is held for unknown costs, it is impossible to perform an independent evaluation of the management reserve, and it is certainly impossible to knowingly underestimate costs that are by definition unknown. *Id.*, pp 4-5.

Addressing I&M's contention that removal of the management reserve means the LCM project will almost certainly be subject to a second prudence review, Staff argues that this is not surprising. Staff's Reply Brief, p 3. Staff states that I&M should have expected a second prudence review since the costs in this case are estimates and actual costs will not be known until a later date. *Id.* Moreover, if I&M is as confident in the LCM project and its associated cost estimates as they have testified, I&M should not have any reservations about

justifying costs in a future prudence review, regardless of the burden-of-proof requirements in the statute. *Id.*

Staff responds to I&M's claims that the management reserve is the only source of contingency in the LCM project by noting that I&M supports its claim by citing cross-examination and rebuttal testimony that was altered on the stand. Staff's Reply Brief, p 4. Staff asserts that I&M does not provide any numerical or documentary support for its witnesses' last-minute changes. *Id.* During the evidentiary hearing, I&M witness Paul Chodak changed his prefiled rebuttal testimony to state that the management reserve is the only contingency in the LCM project. Staff's Initial Brief, p 28 (citing 3 TR 80-81). In addition, I&M witness Mr. Schoepf said during cross examination that I&M removed contingencies from the Shaw report. *Id.* (citing 4 TR 467 and 4 TR 535). Staff contends that other than these bare assertions, there is no record evidence to confirm that I&M removed these contingencies, and that all other evidence leads to the opposite conclusion. *Id.* Further, Staff argues that although I&M now says that it removed contingencies from the Shaw Report during the first phase of its cost estimate, it admits that it "then added back indirect costs to develop a cost estimate." Staff's Reply Brief, p 4 (citing I&M's Initial Brief, p 38.) Staff maintains that I&M does not explain what it included in indirect costs, and based on the record, it is not clear whether indirect costs include additional contingencies. *Id.*

Staff states that despite I&M's assertions to the contrary, Staff does not assume that I&M can predict the future, and Staff does not dispute that reasonable contingency costs are often included in project estimates. Staff's

Initial Brief, pp 27-28. Staff nonetheless opposes efforts to include multiple levels of contingencies for preapproval in this case.

Staff states that if I&M truly removed contingencies from its cost estimates, it is unfortunate that it did not document the steps that it took so that all the parties could reach the same conclusion. Staff's Initial Brief, p 29. Staff acknowledges that I&M is entitled to a contingency. *Id.* If I&M had clearly removed overlapping contingencies, Staff would have reevaluated its position. *Id.* (citing 5 TR 777-778). But Staff states that based on the record before it, it was left with the inescapable conclusion that I&M's estimates included several contingency layers. *Id.* (citing 5 TR 769). Without further proof to the contrary, Staff cannot in good conscience support the excessive layers of contingency in the LCM project. *Id.* Staff recommends that the Commission should wait until management reserve expenses are known before deciding whether to grant recovery. Staff's Reply Brief, p 5.

For the reasons set forth above by the Staff and the Attorney General, and those discussed below, the ALJ is persuaded that I&M's request to include the $220 million management reserve should be denied. Section 6s(6) requires the Commission to "specify the costs approved for the construction of or significant investment in the electric generating facility . . . ." MCL 460.6s(6). The ALJ agrees that approving $220 million for "unknown unknowns" is problematic under the statutory scheme. Although a contingency may be a common item in a large construction contract, the fact that Section 6s(9) *prohibits* the Commission from disallowing recovery of costs an electric utility incurs in constructing or investing

in an electric generation facility for which a CON has been granted if the costs do not exceed the costs approved by the Commission in the CON strongly suggests that the Commission should be very cautious in approving contingency amounts in the CON setting. The purpose of Section 6s is to provide an electric utility with some assurance of recovery of the costs of its investments in projects permitted by the statute; it is not to provide an electric utility the opportunity for a potential windfall, at the expense of ratepayers, of allowing extra and unneeded spending if the utility is able to bring a project in under budget. The evidence in this case also calls for caution where I&M has stated that "early indications from sub-projects which are advancing show costs are generally lower than Phase 1 estimates." I&M's Reply Brief, p 19, fn 10 (citing 4 TR 418).

The ALJ also finds that I&M has failed to meet its burden of proof regarding the management reserve. Although I&M argues that the record is clear that the only contingency in the LCM project is the management reserve, the ALJ is not convinced. Staff correctly points out that the evidence regarding removal of all other contingencies, including those in the Shaw Report, came late in the proceeding during cross-examination and was not supported by documentary evidence. I&M's argument that the Shaw Report covered only 32 of the 117 LCM sub-projects is diminished by the fact that the cost estimates for those 32 sub-projects covered by the Shaw Report represent 67% of the 117 sub-project total costs. 4 TR 520c.

Further, the record is not clear that there are not multiple layers of contingencies as Staff suggests. For example, Mr. Schoepf testified that risk

reserve is included in the funding of each project as it progresses to address discrete potential issues. 4 TR 431. He also testified:

> Q. Is there a process in place for dealing with such an event, that event being a project reaching a cost in excess of its budget?
>
> A. Absolutely. There are multiple processes. First, within an individual project, the project, in this case if we are talking LCM has a sub-project budget -- and when you get an indication that a budget is going to be exceeded, there is a number of options you would go through. *First, you would look at do you have -- and this is defined in our projects processes -- do you have a contingency or risk reserve within that individual project that would be the first line of defense*; if there was not a contingency or reserve in that individual project, you would look at other projects to see if you could fund that overage, that cost excess from another project that might be under-running. If none of those options are available under-running, you could, in the case of the LCM projects, cap management reserve with appropriate justification, and we have a process set up for requesting funds from management reserve, so there are a number of processes to deal with that. Again, the specifics would determine how you maneuver through those processes but you would have ways of dealing with that. I guess I should add we talked earlier about project plans and for the LCM projects, like all other major capital projects, they have a cost management plan, each individual sub-project, and that plan would define how you would handle some of those situations. But, again, without the specifics, I can't predetermine what an outcome might be. 4 TR 532-533 (emphasis added).

As noted above, I&M has the burden of going forward with evidence as well as the burden of persuasion, and the ALJ agrees with Staff that on the record present in this case, the Commission should deny I&M's request for inclusion and recovery of a $220 million management reserve in I&M's CON.

3. Uprate costs

The Attorney General argues that the Commission should remove three sets of sub-projects from I&M's CON proposal because they constitute sub-

projects for uprating the Cook plant, not LCM sub-projects. Attorney General's Initial Brief, pp 16, 28; Attorney General's Reply Brief, pp 21-24. Attorney General witness Mr. Hosmer presented testimony explaining how Confidential Exhibit AG-02 identifies sub-projects that were originally classified as uprate sub-projects (see also, Exhibit I&M-25, which presents the full report), and he concluded that the primary justification of those sub-projects was to be prepared to uprate the Cook plant after the expiration of the current licenses for Unit 1 in 2034 and for Unit 2 in 2037. 4 TR 741-747c. Mr. Hosmer concluded that there is an important distinction between investments for life cycle management and other sub-projects (4 TR 747c) and he recommended removing costs listed in Confidential Exhibit I&M-22 for three categories of sub-projects:

Unit 2 TG LP and HP turbine modifications $229 million

Other reclassified uprates to LCM modifications $10 million

Company-identified uprate sub-projects $23 million

Attorney General's Reply Brief, p 21.

These sub-projects are reported as line items in Confidential Exhibit I-22. The Attorney General contends that when line 55 in that exhibit is compared with the information contained on page 118 in Exhibit I&M-25, it becomes apparent that Indiana Michigan has comingled stretch power uprating (SPU) and extended power uprating (EPU) modifications described on page 118 in Exhibit I&M-25 with LCM modifications described on the same page. *Id.*, p 22. He concludes, therefore, that the Commission should not treat these sub-project cost categories as recoverable LCM costs. *Id.*

The Attorney General also maintains that there is no evidence explaining why and how getting ready for an uprate during the period from 2013-2018, would create net benefits for ratepayers through the end of licensing in 2034 and 2037, and that I&M has performed no specific analysis to determine the level of incremental investment that would be appropriate to allow a unit uprate in the future. *Id.*, p 23 (citing 4 TR 557).

I&M opposes Mr. Hosmer's recommendation to remove costs for these specific sub-projects. I&M argues that Whether the Shaw Phase 1 Report classified a sub-project as LCM or not does not bear on the fact that I&M screened each sub-project to determine that the sub-project meets the purpose of enabling the Cook plant to operate safely, reliably, and efficiently during the extended license term. The Shaw Phase 1 Report had an express purpose of evaluating the prospect of uprating the Cook plant's generating capability. Exhibit I&M-25, p 6. LCM modifications were separately identified in the Shaw Phase 1 Report because "they are not expected to be included in the SPU/EPU Program economic evaluation." *Id*. at p 33. I&M notes that the Shaw Phase 1 Report states that "there are a number of SPU and EPU modifications which are also necessary to meet the goals of the LCM program." Exhibit I&M-25, p 10. I&M asserts that the Attorney General's position disregards the record evidence supporting the reasonableness of each of the challenged sub-projects and their costs. I&M's Reply Brief, p 26.

I&M cites the testimony of its witnesses, Mr. Chodak, Mr. Carlson, and Mr. Schoepf as demonstrating that all of the challenged seven sub-projects met the

criteria for the LCM project and are being undertaken to assure the safe and reliable operation of the plant during its extended license period. I&M's Reply Brief, pp 26-32; *see also* 3 TR 108. Examples of this testimony include Mr. Chodak's testimony that these sub-projects are necessary to extend the life of the units beyond the 40-year design life and not because they could also be a part of a future increase in plant capacity. 3 TR 107-108.

As to the specific sub-project categories, Mr. Schoepf testified that Exhibit I&M-25 shows the basis for replacing the Unit 2 turbine (by far the largest of the challenged sub-projects). 4 TR 434. Exhibit I&M-25, section 4.1.6, states that "The Unit 2 HP Turbine is expected to require extensive repairs to outer casing due to erosion on the inside." It continues, "The Unit 2 LP Turbine has had severe erosion of the central blade carriers plus associated leakage losses since 1995 according to the ABB uprate report." 4 TR 434. Based on these assessments and the age of the equipment, I&M maintains that the Unit 2 turbines must be replaced as part of the LCM Project. I&M's Reply Brief, p 28 (citing 4 TR 434).

I&M also cited the testimony of Mr. Carlson to the effect that the Unit 2 Low Pressure and High Pressure Steam Turbines are approaching the end of their service lives and require replacement, and that they are degrading to the point that they require replacement. 3 TR 302, 326. Mr. Carlson also testified that based on I&M's experience regarding the Unit 1 turbine replacement, had I&M not been able to repair it, would have taken upwards of three years. 3 TR 334. He also testified that many, many of these components have a very,

very long lead time and if I&M waits for them to fail, one or both of those Units could be shut down for many months - going into literally years. *Id.*

As to the other sub-projects, Mr. Chodak testified that the generator step up transformer will actually cost less to size appropriately for an uprate than if sized purely for LCM project purposes because the uprate capacity was standard design while the original design was custom. 3 TR 108. I&M also cited Exhibit I&M-25 for additional support for including the "Up-sized" sub-projects within the LCM project:

> The transformer is showing signs of age and service-related degradation. All three phases have exhibited steadily increasing levels of combustible gases due to degradation of the insulating oil from internal heating. I&M's Reply Brief, p 30 (citing Exhibit I&M-25, p 5-226; 4 TR 435-436).
>
> Apart from any EPU-related modification requirements, it is recommended that both Unit 1 and 2 CTS heat exchangers be replaced for life cycle management reasons. AEP's System Health Report (Reference 3) recommended the Unit 1 CTS heat exchangers for replacement due to increasing differential pressure issues on the ESW side from silt settling out in the shell. The Unit 2 CTS heat exchangers are starting to experience the same high differential pressure for the same reasons (Reference 9). In addition, these components have a reduced margin as the result of the increased ultimate heat sink (UHS) temperature and tube side plugging that will also be resolved by replacement. I&M's Reply Brief, p 30 (citing Exhibit I&M-25, p 5-225).
>
> [T]he LCM modification to replace LP Feedwater Heaters due to erosion concerns is recommended to have a thermal performance optimized for the 4000 MWt uprate conditions even though the thermal performance of the present size heaters would be acceptable. Additional MWe plant output is gained at a minimal cost. I&M's Reply Brief, p 30 (citing Exhibit I&M-25, p 2-8).

Mr. Chodak testified regarding the appropriateness of including the $10 million of "Reclassified sub-projects" within the LCM project. 3 TR 109-110. Mr. Schoepf also provided testimony justifying the inclusion of those sub-projects:

> The Emergency Diesel Fuel Oil Tank project has been included in the LCM Project for unit reliability because currently Cook Plant uses a single fuel oil storage tank to supply two emergency diesel generators. This makes Cook Plant an industry outlier as most stations have one tank per emergency diesel generator for reliability and tank surveillance issues.
>
> The Steam Generator Water Level Control Project has been included for aging and obsolesce issues because the controls are approaching end of life and require replacement, and the current system is not fault tolerant and has caused unreliable Feedwater Regulating Valve performance.
>
> The Heater Drain Pump Discharge Valves project has been included for unit reliability because the valves are contributing to current operational problems due to limited capability.
>
> The Generator Exciter Cooling Modification Project has been included for aging and obsolesce issues because of lack of qualified service personnel to maintain the system, long lead time, and limited availability of spare parts for the duration of the plant's extended license.
>
> Based on the issues above, Cook Plant has experienced down time and de-rated operation. For this reason, the inclusion of these projects as LCM sub-projects is reasonable and necessary. 4 TR 438.

Staff has not challenged inclusion in I&M's CON of any of the seven sub-projects discussed above. Moreover, Staff agrees that it is reasonable to plan for a probable uprate now in order to avoid additional costs in the future. Staff's Initial Brief, p 16.

The ALJ is convinced that the evidence presented meets the requirements of Section 6s(4)(a) and Section 6s(4)(c) for inclusion in I&M's LCM project and its

CON. The Attorney General's challenge largely addresses the need for these specific sub-projects and not their specific costs, although the Attorney General claims that they are not reasonable under Section 6s(4)(c). The ALJ finds that the record supports including the costs for these sub-projects.

D. Section 6s(4)(d)

Section 6s(4)(d) requires that the Commission determine that:

> The existing or proposed electric generation facility or proposed power purchase agreement represents the most reasonable and prudent means of meeting the power need relative to other resource options for meeting power demand, including energy efficiency programs and electric transmission efficiencies. MCL 460.6s(4)(d).

I&M contends that the LCM project represents the most reasonable and prudent means of meeting the power need relative to other resource options for meeting power demand, including energy efficiency programs and electric transmission efficiencies. It cites the testimony of Mr. Chodak that compared to other alternatives, the LCM Project represents substantial savings. 3 TR 95.

I&M's witness Mr. Torpey presented I&M's Integrated Resource Plan (IRP) as required by the Commission's filing guidelines, discussed the range of supply and demand side options considered by I&M to meet its capacity requirements and demonstrated that the LCM project is the least cost alternative. 4 TR 547. He explained the assumptions made regarding Cook plant in the IRP. Mr. Torpey included the Cook Units 1 and 2 in the IRP through the end of their extended operating licenses of 2034 and 2037. The IRP assumes that, unless it is not economical to do so, the existing resources of I&M will be maintained or improved as required to meet regulatory mandates.

For supply side resources, screening curves were developed that compared the life-cycle costs of different technologies on a comparable unit cost basis over a range of capacity factors. The screening curves included capital costs, fixed and variable operations and maintenance costs, fuel costs, and emissions costs projected over a 40-year period. 4 TR 550-551. The cumulative present worth of these costs are calculated and converted to costs on a $/MWh or $/kW-year basis at varying capacity factors. From these curves, specific peaking, intermediate and base load duty-cycle technologies were selected for further resource optimization modeling. Mr. Torpey compared the ongoing costs of the Cook plant with the LCM Project costs to other technology options and presented the results in Exhibit I&M-4. Exhibit I&M-4 shows that the Cook plant with the LCM project costs is the preferable resource at capacity factors greater than 20%. 4 TR 552. Cook plant capacity factors ordinarily range in percentage from the high seventies to the mid-nineties. 4 TR 551. At these capacity factors, Mr. Torpey concluded that the Cook plant with the LCM project costs "has a significant cost advantage over other technologies." 4 TR 552. Mr. Torpey testified that the IRP considered alternative cogeneration resources, renewable resources, and conservation and load management.

When Mr. Torpey compared the LCM project to other options with even more recent costs, his analysis shows that the LCM project produces savings between $3.1 billion and $4.5 billion over other options. 4 TR 556. Mr. Torpey maintained that this differential shows the enormous cost advantage of maintaining the Cook plant with the LCM project making it, in essence a "no

regrets" project – that even if there were future events that could not be predicted today that would require additional investments in the Cook plant or significantly lower the cost of alternatives, proceeding with the LCM project would still be economical. *Id.*

Mr. Torpey concluded:

> a. I&M, as part of the 2011 I&M IRP filing, has reasonably determined its needs for capacity resources through 2031.
>
> b. I&M operates a number of fossil-fueled units, some of which will be retired as the result of new or proposed environmental control rules.
>
> c. I&M has considered a wide variety of supply and demand options.
>
> d. I&M has performed analyses surrounding key variables and has concluded that a portfolio incorporating the capacity of the Cook Plant during the period 2014 through 2034/2037 is in the best economic interest of I&M and its customers.

Staff takes the position that in comparison to other supply-side resources, I&M's proposed investment to its Cook plant is the least-cost option. Staff's Initial Brief, p 18. Staff also noted that I&M also conducted an economic analysis using its Strategist® model.[16] That analysis compared the cumulative present value of the revenue requirement necessary to invest in the Cook plant with the estimated cost of replacing the two units at the Cook plant with alternative generating capacity. To estimate the cost of replacing the Cook units, I&M used two pricing scenarios (a "base scenario" and a "low gas price scenario") and a sensitivity

[16] Mr. Torpey described the model as follows: "The Strategist® optimization model serves as the empirical calculation basis by which the capacity additions are evaluated and recommendations are made. Strategist® is a commercially available long-term resource optimization tool widely used for resource planning activity in the utility industry over the past two decades." 4 TR 552.

analysis that assumes the Cook units are retired three years beyond their 40-year license lives — Unit 1 would be retired in 2015 and Unit 2 in 2018. 4 TR 555. Staff noted that based on this analysis, Mr. Torpey concluded that the LCM investment costs *$4.5 billion less* than it would cost to replace the two Cook units. *See* Staff's Initial Brief, p 19, *see also*, 4 TR 556, Exhibit I-5.

Staff reviewed the inputs and assumptions in I&M's model and, for the purposes of this analysis, Staff agrees that I&M properly compared the costs of its proposed LCM investment and of potential supply-side alternatives. Staff's Initial Brief, p 20 (citing 5 TR 810). Based on this comparison of the costs, Staff agrees that the Cook plant LCM investment is the least-cost option. *Id.* Staff concludes that the proposed LCM investment represents the most reasonable and prudent option. *Id.*

No party challenged the fact that the LCM project is the least cost option. MEC makes arguments regarding the appropriate scope of the IRP, but still recommends that the Commission approve I&M's IRP. MEC's Initial Brief, p 9.

The ALJ recommends that the Commission determine that I&M's LCM project represents the most reasonable and prudent means of meeting the power need relative to other resource options for meeting power demand, including energy efficiency programs and electric transmission efficiencies, and thus meets the requirements of Section 6s(4)(d). There was no serious opposition on this issue.

E. Section 6s(4)(e)

Section 6s(4)(e) requires the Commission to determine whether:

> To the extent practicable, the construction or investment in a new or existing facility in this state is completed using a workforce composed of residents of this state as determined by the commission. This subdivision does not apply to a facility that is located in a county that lies on the border with another state. MCL 460. 6s(4)(e).

All parties agree that Section 6s(4)(e) does not apply to this application as the facility is located in Berrien County, Michigan, which lies on the border of the State of Indiana. 4 TR 365. Nonetheless, I&M witness Mr. Schoepf testified that local union halls will be contacted first to provide skilled labor for the LCM Project. 4 TR 422.

VII.

THE REQUIREMENTS OF SECTION 6s(7)

Section 6s(7) requires that:

> The utility shall annually file, or more frequent if required by the commission, reports to the commission regarding the status of any project for which a certificate of necessity has been granted under subsection (4), including an update concerning the cost and schedule of that project.

I&M proposes to provide semi-annual reports to the Commission until the LCM project is completed. 3 TR 96-97. No party opposes I&M's proposal, and Staff concurs with the proposal. Staff's Initial Brief, pp 33-34.

The ALJ recommends that the Commission adopt I&M's proposal to provide semi-annual reports to comply with Section 6s(7).

VIII.

THE REQUIREMENTS OF SECTION 6s(11)

Section 6s(11) states, in part:

> The commission shall establish standards for an integrated resource plan that shall be filed by an electric utility requesting a certificate of necessity under this section. MCL 460.6s(11).

Section 6s(11) then lists various items to be included. MEC raised issues relating to I&M's originally-filed IRP, and requested that I&M conduct additional analyses. *See*, Exhibit MEC-20. MEC requests that the Commission requires the analyses in Exhibit MEC-20 be conducted for all IRPs.

MEC states that its principal objective as an intervenor in this proceeding has been to support the development of a prudent integrated resource planning policy in Michigan, as directed by the Legislature in PA 286. MEC's Initial Brief, p 19. MEC witness Athas provided a range of comments and criticisms of I&M's initial IRP filing in this case. In general, Mr. Athas' critique of the initial record focused on its narrow range of alternative scenarios and the lack of transparency and analytical rigor in its comparison of those scenarios to the proposed LCM project. Mr. Athas not only criticized the original IRP evidence for its omission of certain analyses required by PA 286, but he also testified that the evidence did not include consideration of other elements of prudent planning such as fuel diversity and project cost sensitivities. MEC contends that integrated resource planning should be viewed as an opportunity to test future plans against alternative future scenarios with different input assumptions. *Id.*, pp 19-20. MEC asserts that an IRP submitted under PA 286 should go beyond a simple

comparison of a utility's proposed project to basic alternatives. MEC maintains that the range of alternative scenarios and their input assumptions should be diverse and wide-ranging, but the projected costs and benefits of a utility's base case proposal should also be subjected to input assumption stresses that develop a high-cost, low-value, "worst case scenario" version of the proposed project. *Id.*, p 20.

The other parties, in general, did not oppose MEC's request for guidance from the Commission on the requirements for IRPs. Yet, even MEC admitted that the issues it raised were not outcome determinative and, in the end, recommended approval of I&M's IRP. *Id.*, p 9.

The ALJ recommends that I&M's IRP be approved. The ALJ will leave it to the Commission to give whatever guidance it deems appropriate regarding future IRPs, but notes that the concerns raised by MEC may assist the Commission in preparing such guidance.

IX.

THE REQUIREMENTS OF SECTION 6s(12) AND OTHER ACCOUNTING ISSUES

Section 6s(12) provides that:

> The commission shall allow financing interest cost recovery in an electric utility's base rates on construction work in progress for capital improvements approved under this section prior to the assets being considered used and useful. Regardless of whether or not the commission authorizes base rate treatment for construction work in progress financing interest expense, an electric utility shall be allowed to recognize, accrue, and defer the allowance for funds used during construction related to equity capital. MCL 460.6s(12).

I&M has proposed a series of accounting and deferral accounting authorities in connection with its CON. *See, e.g.* I&M's Initial Brief, pp 14-17. The Attorney General argues that the Commission lacks subject matter jurisdiction to grant the deferred accounting requested by I&M. Attorney General's Initial Brief, pp 33-34. It is not clear if the Attorney General is opposing the specific relief set forth in Section 6s(12), as that section is not mentioned in his arguments. Likewise, ABATE recommends that I&M's "ratemaking" position be rejected. ABATE's Initial Brief, pp 4-5. ABATE, too, makes no mention of Section 6s(12).

I&M replies to the Attorney General and ABATE that I&M has not requested that customer rates be adjusted through an order issued in this proceeding. I&M's Reply Brief, p 36. I&M asserts that this is not a ratemaking case and no customer rates will be altered by an order issued in this case. *Id.* Yet I&M contends that deferred accounting is appropriate and should be approved. *Id.*

Staff states it interprets Section 6s(12) as requiring the Commission to allow I&M to record its AFUDC that relates to equity capital, but notes that I&M is asking to record AFUDC relating to both debt and equity capital. Staff's Initial Brief, p 31. Staff opines that it is within the Commission's authority to deny I&M's request to defer its debt-related AFUDC, Staff agrees with I&M's request and recommends that the Commission adopt I&M's proposal. *Id.*

Staff then goes on to make various recommendations concerning how I&M's other accounting requests should be modified. *Id.*, pp 31-33.

The ALJ finds that the Commission need not address I&M's requests for the items covered by Section 6s(12) in this case. Section 6s(12) provides what it provides. As I&M itself points out, this is not a ratemaking case and no customer rates will be altered by an order issued in this case. I&M's Reply Brief, p 36. Recovery of those items will be addressed in a rate case.

Similarly, I&M's other accounting authority requests need not be addressed in this case. Section 6s contains no provisions, other than 6s(12) (which provides its own specific mandates), that contemplate the Commission granting the types of accounting authority requested by I&M in a CON case. I&M has not cited any authority requiring that the Commission grant such requests in this case.

The ALJ believes that the purpose of Section 6s is to provide an electric utility with some assurance of recovery of the costs of its investments in projects permitted by the statute. Section 6s(12) provides assurances with regard to certain financing and AFUDC costs, which can be addressed in a base rate case.

X.

THE REVIEW PROCESS

Staff recommends that the Commission establish a review process for the LCM project in light of MCL 460.6s(9). Staff's Initial Brief, p 30. Ms. Kindschy testified:

> Since each subproject will ultimately be going into service when that subproject is used and useful, it will be necessary to evaluate each subproject separately to determine whether the subprojects were over budget. Furthermore, since the subprojects have

> different in service dates and costs, it will be necessary to evaluate each subproject independently to determine if there were excess costs that I&M must prove were just and reasonable under MCL 460.6s(9). 5 TR 771-772.

Although Staff seemed to believe that this was not opposed, I&M replied that Staff's position that each sub-project be reviewed in the future as it becomes part of rate base for purposes of MCL 460.6s(9) is problematic and unnecessary. I&M's Initial Brief, p 24. I&M states that it is seeking the Commission's approval of the LCM project cost, not the individual sub-projects costs; otherwise, it would have allocated contingencies to each sub-project. I&M asserts that for the construction of a new power plant, the Commission would not engage in specifying costs for each separate sub-project involved. *Id.* Instead, as MCL 460.6s(9) contemplates, the Commission would determine the reasonable total cost. I&M argues that the Commission should do so in this case as well. *Id.* I&M maintains that it has identified all of the sub-projects required for successful completion of the LCM project, but reviewing individual sub-projects on a case by case basis without taking into account the management reserve and overall cost of the project risks countless mini-prudence reviews under MCL 460.6s(9) when the overall cost of the LCM project could be, in total, less than estimated. *Id.* I&M argues that such a process is hardly efficient and not an effective regulatory paradigm. *Id.*

The ALJ agrees with Staff that individual reviews are appropriate. Unlike a new power plant, I&M is, in many ways, treating the LCM sub-projects as separate projects for ratemaking purposes. Even though they are for a singular purpose, the sub-projects will be added to rate base over several years, and will

be deemed used and useful at different times. Therefore, the ALJ finds that separate reviews are appropriate.

XI.

THE REQUIREMENTS OF SECTION 6s(6)

Section 6s(6) requires that:

> In a certificate of necessity under this section, the commission shall specify the costs approved for the construction of or significant investment in the electric generation facility, the price approved for the purchase of the existing electric generation facility, or the price approved for the purchase of power pursuant to the terms of the power purchase agreement.

Staff has stated its understanding that all I&M's LCM sub-projects are known at this time and that no additional subprojects will be added. Staff's Initial Brief, p 29 (citing Exhibit S-3; 5 TR 771). No party rebutted Staff's testimony to this effect. Staff stated that it understands that sub-projects may undergo slight modifications as they enter new phases, their primary scope and purpose should not change. *Id.* (citing 5 TR 771). Therefore, Staff recommends that the Commission limit the costs it permits I&M to recover to the 117 sub-projects identified in this case.

As discussed above, some parties urged removal of some of the LCM sub-projects. The ALJ has recommended that these positions be rejected. Therefore, the ALJ agrees with Staff that the Commission limit the costs it permits I&M to recover to the 117 sub-projects identified in this case.

XII.

CONCLUSION

In accordance with the above, the ALJ recommends that the Commission grant I&M a certificate of necessity pursuant to MCL 460.6s for the LCM project in the amount of $773,611,000, and adopt the other recommendations by the ALJ in this PFD.

MICHIGAN ADMINISTRATIVE HEARING SYSTEM
For the Michigan Public Service Commission

Thomas E. Maier

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Thomas E. Maier
Administrative Law Judge

ISSUED AND SERVED: December 17, 2012
Drr